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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 370

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Petitioner*,

v.

DANIEL T. JACKSON, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is printed in the Record (R. 96). It is reported at 233 F. 2d 660. There was no reported opinion in the District Court. The order of the District Court denying defendant's motion to strike that part of the complaint which alleged violations of the Safety Appliance Act (R. 13), and the memoranda filed by the District Court on rehearing of defendant's motion to strike (R. 13-14) and accompanying an order denying defendant's motion for a new trial (R. 16) are also printed in the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1956 (R. 104). The petition for a writ of certiorari was filed on August 31, 1956, and was granted on November 5, 1956 (R. 105). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

As stated in the petition for certiorari, this case presents the single important question whether or not the Safety Appliance Act is applicable to four-wheel motor track cars and push trucks. This question may be considered from two different aspects:

1. Was it the intent of Congress that a motor track car should be considered a "locomotive," and a push truck a "car," and the two vehicles when coupled a "train" within the meaning of those terms in the Safety Appliance Act?

2. If Congress intended to include motor track cars and push trucks when the terms "locomotive," "car" and "train" are used, are not these four-wheel vehicles exempted by Section 6 of the Act which exempts "trains composed of four-wheel cars"?

STATUTES INVOLVED

The full texts of Sections 1, 2, 6, 8 and 11 of the Safety Appliance Act are printed in Appendix A to this brief. In pertinent part Sections 1, 6 and 11 provide:

Section 1, 45 U.S.C. § 1.

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train

can control its speed without requiring brakemen to use the common hand brake for that purpose.'' 27 Stat. 531.

Section 6, 45 U.S.C. § 6.

". . . *Provided*, That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.'' 27 Stat. 532; 29 Stat. 85; 62 Stat. 909.

Section 11, 45 U.S.C. § 11.

"It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders . . .'' 36 Stat. 298.

STATEMENT OF THE CASE

Respondent, a Baltimore & Ohio Railroad Company section foreman, brought an action under the Federal Employers' Liability Act seeking damages for injuries sustained when a motor track car which he was driving struck a dog and overturned. The car was towing a four-wheel vehicle known as a push truck. Two other members of respondent's work crew were riding the car (R. 24), and tools were piled on the push truck (R. 25). This was a usual and customary method of going to and from the place on the line where work was to be done (R. 22, 41, 43, 48).

Respondent testified that the brakes worked properly at the time of the accident and locked the wheels when he pulled back the brake lever (R. 55). Accordingly, this case does not involve a defective appliance.

Two causes of action were alleged in the complaint, and the case was presented to the jury on two grounds: first, a claim of common law negligence (use of the motor track car on wet and slippery rails and an alleged failure to provide the motor track car and push truck with adequate braking power); and second, violation of the Safety Appliance Act. With regard to the latter, the jury was instructed over petitioner's objection:

> "Now, the other ground of recovery is based upon an Act of Congress known as the Safety Appliance Act.
>
> "Congress has required railroads to furnish certain equipment for the use of the operation of the railroad. Among those that are necessary—as in this particular case—was that the law required the railroad to have hand brakes on this truck, and to have brakes on the motor car controlling the brakes on both the truck and the motor car.
>
> "The evidence clearly showed, and it is admitted that this equipment was not furnished; and you will find, therefore, that if by reason of the failure to furnish that equipment, this accident happened, that that was the proximate cause or a contributing cause of the accident, then the Railroad is liable to the Plaintiff; and no negligence on the part of the plaintiff, himself, is a bar to his right to recover under the Railroad Safety Appliance Act." (R. 74)

Petitioner had sought to have the issue of violation of the Safety Appliance Act removed from the case by motion to strike which was denied before trial (R. 13-14), by proper objections to the instructions, and by a motion for a new trial which was also denied (R. 16). On appeal to the United States Court of Appeals for the District of Columbia Circuit the holding of the lower court was affirmed (R.

105). The opinion of the Court of Appeals appears at 233 F. 2d 660.

This case squarely presents the narrow question whether Sections 1 and 11 of the Safety Appliance Act (45 U.S.C. §§ 1 and 11) apply to maintenance of way vehicles such as track motor cars and push trucks. If the Act applies, the instruction was proper. If the Act does not apply, the instruction was clearly prejudicial and a reversal of the Court of Appeals' decision and remand to the District Court for a new trial on the issue of negligence alone is required.

A picture of a motor track car with a maintenance crew aboard and push truck attached and a picture of a push truck alone appear as Appendices C and D to this brief. The vehicles shown in these pictures are substantially identical to those involved in the accident (R. 38, 40). They are small four-wheel vehicles, weighing, as the Court of Appeals noted (R. 96) slightly over 800 pounds each (R. 41). The motor track car is powered with a gasoline motor, controlled with a throttle (R. 50), clutch and hand brake (R. 22). It is the successor to the familiar hand car of an earlier day.

Some 60,000 of these motor track cars are currently in use on American railroads (R. 77, 78). They are used with push trucks to carry maintenance crews and equipment from section houses to the locations out on the line where work is to be performed. Because these work sites may be miles away from the nearest switch, and because section crews en route to or from work may be met or overtaken by regular trains, maintenance vehicle must be light enough to be lifted and removed from the track by a three man crew to let the trains go by (R. 42). This had been done on the day of the accident (R. 35). Air brakes or a braking system by which the driver of the motor car can cause brakes to be applied on the push truck are not used on vehicles of this type (R. 41, 77, 78). Push trucks are not

equipped with brakes (R. 41, 77, 78), and are attached to motor cars with a simple non-automatic coupling device, as the pictures indicate. Appendices C and D. They are frequently operated by being pushed by hand (R. 23).

The Interstate Commerce Commission has never considered this equipment subject to the Act (R. 90-91), and neither the Commission nor the Department of Justice has ever sought to prosecute any railroad for failing to equip a motor car or push truck with the devices required by the Safety Appliance Act for locomotives, trains and cars (R. 73).

SUMMARY OF ARGUMENT

I. The Safety Appliance Act does not apply to the small maintenance of way vehicles involved in this case. On vehicles to which it does apply, the Act requires such appliances as power driving wheel brakes, a train brake system, automatic couplers, secure grab irons or hand holds, draw bars, secure sill steps and efficient hand brakes.

The motor track car and push truck involved here weigh slightly more than 800 pounds each. The push truck has been used since the first rails were laid, and the motor track car is simply a push truck propelled by a small gasoline engine. These vehicles in terms of origin, development and present use are entirely separate from locomotives and cars used in railroad trains.

Section 1 of the Act, which requires power driving wheel brakes and train brakes, speaks in terms of a "locomotive engine," "engineers," "brakeman" and "train". In the long history of American railroading these terms have never been used to designate maintenance of way equipment or the men who operate it.

The legislative history shows beyond question that in enacting the Safety Appliance Act Congress was concerned with the safety problem of railroad trainmen braking and

coupling regular trains. The Act's requirements were aimed directly at cutting the accident toll in this hazardous occupation. There are no brakemen on motor track cars and push trucks and no trainmen going between cars to couple or uncouple them. These vehicles are coupled simply by pushing them together by hand. Whether they ever could be equipped with air brakes, automatic couplers and the like is a matter of doubt. So far as is known, none has ever been so equipped.

The Interstate Commerce Commission—sponsor of the Safety Appliance Act and amendments to it and the agency responsible for administration of the Act—has never construed it as applying to these vehicles. The consistent administrative interpretation for sixty-three years has been that the Act does not apply.

In holding that the Act did apply in this case, the lower court held that the motor track car involved was a "locomotive." This holding is without precedent in any known case. It cannot be reconciled with the view of the railroad industry or the agency which regulates it. It is contrary to the view of some twenty-six state legislatures which have prescribed equipment for motor track cars on the assumption that they were not "locomotives." (Since Congress has preempted the field of regulation to locomotives, state legislation is precluded.)

Nor is there support for the holding of the court below that Section 11 of the Act requires push trucks to have hand brakes. The legislative history of Section 11 shows that it applies to train cars and not maintenance vehicles, and that its purpose was to require railroads to keep the hand brakes on freight cars in good repair to eliminate accidents in "humping" cars. These considerations are completely irrelevant to push trucks.

II. If, however, the Act is considered applicable to motor track cars and push trucks, the motor track car with push truck attached is exempt as a "train composed of four-

wheel cars" under Section 6 of the Act. The literal language of the exemption applies direcly to these vehicles. The legislative history of the original provision in 1893 and its amendment in 1896 shows that Congress intended to exempt vehicles to which it would be impossible or impracticable to attach Safety Appliance Act devices. Nothing in this history lends affirmative support to the proposition that the exemption was either written or intended to be restricted to coal cars. The designation "four-wheel cars" is a reasonable classification for the vehicles that Congress intended to exempt and the vehicles in this case come within the exemption, if under the Act at all.

III. The Interstate Commerce Commission's practical construction of the Act with regard to these vehicles is entitled to the greatest weight this Court accords to administrative interpretations. The Commission sponsored the Safety Appliance Act and its amendments. The Commission's interpretation that the Act does not apply to motor track cars and push trucks has been well-known to Congress which has never attempted to change it despite long-continued opportunity to do so.

Lastly, courts should not attempt on this type of record, made in a personal injury case, to determine questions of policy with respect to safety legislation, questions which should properly be resolved after investigation by Congress or by the Commission.

ARGUMENT

I.

The Safety Appliance Act Does Not Apply to the Small Maintenance of Way Vehicles Involved in This Case

A. EQUIPMENT WHICH THE ACT REQUIRES

The Safety Appliance Act (45 U.S.C. §§ 1-16)[1] makes it mandatory that certain types of equipment be used on railroad vehicles covered by the Act. Criminal penalties are imposed for each violation[2] and civil liability in damages under the Federal Employers' Liability Act follows as a matter of course.[3] Specifically, the Act applies to "all trains, locomotives, tenders, cars, and similar vehicles"[4] and requires that such vehicles be equipped with the following devices:

> A power driving wheel brake and appliances for operating the train-brake system on each locomotive engine. (Section 1) (This requirement has uniformly been met by installation of an air brake system.)
>
> Power or train brakes on every train. (Section 1)
>
> Couplers, coupling automatically by impact on all cars. (Section 2)

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[1] The Safety Appliance Act is contained in four acts of Congress. The first seven sections of the present Act became law on March 2, 1893, 27 Stat. 531. Section 6 was amended in 1896, 29 Stat. 85. Sections 8, 9, and 10 were added by amendment on March 2, 1903, 32 Stat. 943. The Safety Appliance Act of 1910, 36 Stat. 298, has been codified with the original Act as amended and appears in the U. S. Code as §§ 11 through 16. In its present form the entire Act appears in §§ 1 through 16 of Title 45, U. S. Code. References in this brief are to the U. S. Code Sections.

[2] See § 6, 27 Stat. 532 (1893) as amended, 45 U.S.C. § 6 (1952); § 13, 36 Stat. 299 (1910), 45 U.S.C. § 13 (1952).

[3] Speaking generally, in an action under the Federal Employers' Liability Act, violation of the Safety Appliance Act is, in effect, negligence *per se* and if such "negligence" is a proximate cause of the employee's injury, the railroad is liable under the Federal Employers' Liability Act *Jacobson* v. *New York, N.H. & H.R. Co.*, 206 F. 2d 153 (1st Cir. 1953).

[4] § 8, 32 Stat. 943 (1903), 45 U.S.C. § 8 (1952).

Secure grab irons or hand holds on ends and sides of all cars. (Section 4)

Draw bars at prescribed standard height on all cars. (Section 5) (A draw bar is a metal bar or arm to which the coupler is attached.)

Secure sill steps in all cars. (Section 11) (A sill step is a U-shaped iron attached to the sill of a car as a step for trainmen.)

Efficient hand brakes on all cars. (Section 11)

The appliances listed are required on *all* vehicles covered by the Act and if the vehicle is a "car" or "locomotive," it must be equipped with *all* the appliances prescribed by the Act for "cars" or "locomotives" respectively.[5]

Congress has passed additional legislation on the subject of safety. The Ashpan Act, 45 U.S.C. §§ 17-21 is not involved in this case at all because it deals only with steam locomotives. The Boiler Inspection Act, 45 U.S.C. 22-34, was referred to in the complaint and a violation was charged, but the District Court did not instruct the jury with respect to this Act and the question of its applicability was not passed upon in the Court of Appeals. Other safety legislation has no bearing on this case.

B. HISTORY OF MAINTENANCE OF WAY EQUIPMENT

The push truck of the present day has been in existence since the first use of rails.[6] It consists simply of a flat wooden platform supported on four flanged wheels and can be pushed or pulled along the rails by hand.

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[5] Congress clearly intended the Act to be read as a whole and a uniform interpretation to be given to each word describing the vehicles covered. Section 8, added in 1903, defines the vehicles covered by the entire Act, and § 16, added in 1910, 36 Stat. 298, provides that the sections added at that time (§§ 11-16) apply to every vehicle covered by the previous Act as amended.

[6] A German woodcut shows a push truck in use some twenty-five years after Columbus discovered America. 31 Railroad Magazine, No. 4, March, 1942, p. 11.

The motor track car evolved from the early push trucks. The first step occurred when someone, calling on his experience in poling a boat, applied the same method of propulsion to a push truck.[7] This method of locomotion proved impractical and soon gave way to a device consisting of hand cranks geared to the axle and operated by two men.[8] Next, the idea of the walking beam was borrowed from the old town fire pump and the well-known walking beam and gear-driven hand car was the result. Although this was a decided improvement, the hand car had its drawbacks, for it drew heavily on the energy of the men, and it was still slow.[9]

For many years, further progress awaited the development of a source of power that was simple, light, and dependable. In the latter part of the 19th century, railroads began to use a gasoline engine to drive the pumps on water service stations, and it was not long before ingenious track maintenance men adapted these engines to their push trucks and hand cars. Soon, almost every maintenance of way section gang had a push car or hand car equipped with a small gasoline engine which had been rigged up by the foreman or one of his gang.[10] Although the railroads provided the fuel and repairs, the engine for a track car was usually purchased by the foreman.[11]

Railway equipment manufacturers soon began to produce motor track cars for the railroad industry. Some authorities believe the first stock motor track car was marketed

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[7] 36 American Railway Engineering Association Proceedings 268 (1935).

[8] 26 Railway Engineering and Maintenance 5 (1930).

[9] 36 American Railway Engineering Association Proceedings 269 (1935).

[10] 31 Railroad Magazine, No. 4, March, 1942, p. 20.

[11] Maintenance of Way Cyclopedia, 1st ed. 1921, p. 39.

in 1883, [12] others that this ocurred in 1893,[13] and still others state that it did not occur until 1896.[14] However, by 1898 these vehicles appear to have come into general use, since a section foreman's handbook published in that year contained descriptions and diagrams of motor track cars.[15] *The Master Car Builder's Dictionary and Cyclopedia* (the first edition of which appeared in 1879) published information on the subject for the first time in 1906.[16]

Because motor track cars provide the only means by which track maintenance employees and their tools can reach all points on the railroad, this vehicle has been the work horse and an indispensable part of the equipment of the industry for decades. According to the authoritative *Railway Engineering and Maintenance Cyclopedia,* it would be impossible to maintain the nation's railroads properly without motor track cars.[17] In 1928 alone, approximately 4,800 motor track cars costing $1,200,000 were purchased.[18] Although no exact figures are available concerning the total number of motor cars in service, this figure was estimated twenty-five years ago at 60,000, representing a total investment of more than twelve million dollars.[19] At that time, the total number of motor cars in use was being increased at the rate of 2,000 per year and an additional 2,800 cars were being purchased annually to replace cars retired from service.[20]

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[12] Railway Engineering and Maintenance Cyclopedia, 6th ed. 1945, p. 37; 31 Railroad Magazine, No. 4, March, 1942, p. 31.

[13] 85 Railway Age 726 (1928).

[14] Railway Engineering and Maintenance Cyclopedia, 2nd ed. 1926, p. 340; 26 Railway Engineering and Maintenance 6 (1930); 36 American Railway Engineering Association Proceedings 269 (1935).

[15] Paine, The New Roadmaster's Assistant 148-150 (1898).

[16] Carbuilder's Dictionary 483-487 (1906).

[17] Railway Engineering and Maintenance Cyclopedia, 8th ed. 1955, p. 6.

[18] 26 Railway Engineering and Maintenance 6 (1930).

[19] Ibid.

[20] Ibid.

The standard reference work for maintenance equipment, states that the operation of motor track cars on main tracks, especially by a few men, includes an element of hazard; the safety of the men, and of train traffic as well, depends upon the speed with which the motor car can be removed from the track. Hence, light weight is of the utmost importance.[21]

It is clear the push trucks and hand cars had been in general use prior to 1893 when the first Safety Appliance Act was passed, and that motor track cars were in fairly general use prior to 1903, when Section 8 was added clarifying the coverage of the Act with respect to vehicles.

C. SECTION 1 DOES NOT APPLY TO MAINTENANCE OF WAY VEHICLES

(1) The Language of Section 1 Cannot Be Interpreted to Cover These Small Vehicles

Maintenance operations on a railroad are conducted by employees different from those who operate the trains. They are normally under a different company department. They represent a different craft and have traditionally belonged to a separate brotherhood, the Brotherhood of Maintenance of Way Employes.[22] The vehicles which they use for going to and from work are assigned to them, cared for and operated by them, and are never used by trainmen, the men who drive, brake, switch and handle trains.

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[21] Railway Engineering and Maintenance Cyclopedia, 6th ed. 1945, pp. 32-33.

[22] See Hertel, History of Brotherhood of Maintenance of Way Employes p. xi (1955).

"The Brotherhood of Maintenance of Way Employes is a railroad labor organization representing some 300,000 railroad maintenance of way workers in the United States and Canada . . . .

"You have often seen them putt-putting down the track on a motor car or working in groups renewing ties, replacing rail or refurbishing the right of way . . . .

"The work of the maintenance of way man is hazardous . . . usually his work is done under the hazards of train traffic, on the main line where he must keep a sharp lookout for trains . . ." *Ibid.*

Section 1 of the Safety Appliance Act reads as follows:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any *locomotive engine* in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the *train-brake system*, or to run any *train* in such traffic that has not a sufficient *number of cars* in it so equipped with power or *train brakes* that the *engineer* on the *locomotive* drawing such *train* can control its speed without requiring *brakemen* to use the *common hand brake* for that purpose," 27 Stat. 531. (Emphasis added.)

A small motor car used primarily to haul section hands and tools to and from work, and only incidentally to pull a flat bed push truck carrying more tools or supplies, would never be called a "locomotive engine" except in jest. To call it that is to call it a name by which it has never been known in everyday life or in railroad parlance. To term the motor car and push truck when hooked together a "train" and the section foreman "the engineer" is to give to common, clearly understood, non-technical terms a meaning which they have never had in normal usage. The necessary assumption that this combination of motor car and push truck would normally be operated, in the absence of a train brake system, with a brakeman operating a hand brake on the push truck has no basis in reality.

Section 3 of the Act is revealing on the subject of what Congress mean to cover by the terms "locomotive engines, trains and cars" in section 1. Section 3 provides:

> "When any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section 1 of this title, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with said section, with such power or train

brakes as will work and readily interchange with the brakes in use on its own cars, as required by sections 1-7 of this title." 27 Stat. 531.

It is obvious when Sections 1 and 3 are read together that Congress was referring to train cars in the usual sense, in other words, to freight cars which in normal use are transferred from one railroad to another to complete a shipment. The problem of Section 3 could not conceivably arise with maintenance of way vehicles.

The clearest and strongest expression of a congressional intent to include maintenance of way vehicles under this section would have to be found in the legislative history before such a holding could be justified.

(2) The Legislative History Discloses No Congressional Intent to Include These Vehicles

There can be no question that the original Safety Appliance Act grew out of a number of accidents in which railway trainmen had been killed or injured by being thrown from the tops of trains when they sought to apply hand brakes, or by being crushed between cars when they sought to engage the old fashioned link and pin couplers. A meeting of railway safety representatives of the various states had been held as early as 1889 on this subject and they had urged the Interstate Commerce Commission to take action.[23] The Commission had presented the problem to Congress in its annual report of 1889 and had continued to do so thereafter until the passage of legislation in 1893.[24]

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[23] See 1 Sharfman, The Interstate Commerce Commission 246, n. 4 (1947).

[24] Interstate Commerce Commission, Annual Reports, hereinafter referred to as Annual Reports. See Annual Report, 1889, 44-45, 84-101, 293-340; Annual Report, 1891, 337; Annual Report, 1892, 70.

The House Committee Report on the original Act refers to the reported "terrible slaughter of brakemen" and notes that "38% of the total number of deaths and 46% of the total number of injuries sustained by railway employees resulted while coupling cars or setting brakes, and whatever cuts off these two sources of great danger would largely reduce the total loss of life and limb." [25]

The Act undertook to eliminate these two sources of injury by requiring train brakes, by which the speed of a train could be controlled "without requiring brakemen to use the common hand brake for that purpose," and by requiring couplers which could operate "without the necessity of men going between the ends of the cars." [26] That the safety hazard Congress sought to eliminate never had existed and never will exist with motor cars and push trucks is too clear to admit of argument.

The requirement of secure grab irons and hand holds in Section 4 had a similar purpose in mind. They were "something which the switchman or brakeman can seize to if he slips, instead of trying to clutch the side of a wet or perhaps icy car." [27] There is no place on a maintenance of way motor car or push truck where a grab iron or hand hold could serve such a purpose. Switchmen and brakemen have nothing to do with these vehicles.

Section 1 of the original Act did not purport to cover all locomotives or train cars used for any purpose on a railroad. The section referred specifically to locomotive engines and to trains used "in moving interstate traffic." Furthermore, Section 2 requiring automatic couplers applied to "any car" and did not specifically say locomotive

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[25] H.R. Rep. No. 1678, on H.R. 9350, 52nd Cong. 1st Sess. 1, 3 (1892).

[26] The quoted words appear in §§ 1 and 2 of the Act, 45 U.S.C. §§ 1, 2.

[27] H.R. Rep. No. 1678, *supra*, note 25 at 5.

or tender. The Circuit Court of Appeals for the Eighth Circuit had held in the case of *Johnson* v. *Southern Pac. Co.*, 117 F. 462 (8th Cir. 1902), that the locomotive was not a car so that it did not have to be equipped with an automatic coupler. In January of 1903, Edward A. Moseley, Secretary of the Interstate Commerce Commission, had written Congress asserting that the statute had been "rendered nugatory" by this decision.[28] Hearings were held before a Senate Committee and H. R. Fuller, the legislative representative of the Brotherhoods of Locomotive Engineers, Locomotive Firemen, Railway Conductors, Railroad Trainmen and Railroad Telegraphers vigorously urged an amendment to the original Safety Appliance Act of 1893 substantially broadening its coverage with respect to vehicles and train movements.[29]

The recommended legislation was passed by Congress on March 2, 1903, and added Sections 8, 9, and 10 of the present Act.[30] The Act was made applicable to common carriers in the District of Columbia and the territories and to all "trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce" or used in connection with vehicles so engaged. Mr. Fuller had supported the use of the words "similar vehicles" in order to be sure that the amended Act would apply not only to locomotives, tenders and cars but also to "cabooses, steam shovels, snow plows, scale cars, and similar conveyances," pointing out that these vehicles were used on trains and operated by trainmen.[31]

It is important to note that the amendment of 1903 was the occasion on which the problem of scope and coverage of the Act *with regard to vehicles* was analyzed. This amend-

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[28] H. Doc. No. 254, 57th Cong. 2d Sess., p. 2, Jan. 9, 1903.

[29] S. Rep. No. 1930, on S. 3560, 57th Cong. 1st Sess. 5-13, 24-58 (1902).

[30] 32 Stat. 943 (1903), as amended 45 U.S.C. §§ 8-10 (1952).

[31] S. Rep. No. 1930, *supra*, note 29, at 46.

ment was sponsored by the Commission and the Railroad Brotherhoods after several years experience under the Act. If the Commission or any group in the railroad industry believed that the Act should be extended to motor track cars and push trucks, this was the time that the position would have been stated. But in all the committee hearings not one mention of maintenance vehicles appears. Not one word was heard from representatives of the Brotherhood of Maintenance of Way Employees, founded in 1887.[32] Nowhere can there be found any indication that Congress had in mind extending the Act to cover any type of vehicle not used in the operation of regular trains.

In no subsequent amendment was the coverage of the Act with respect to vehicles altered.

(3) Practical Considerations Indicate That Congress Did Not Intend Section 1 to Apply to Maintenance Vehicles

The problems which compliance with Section 1 would pose for the railroads with respect to maintenance vehicles are so appalling that they demonstrate that Congress could never have intended this result. The train brake system in common use on the railroads today and indeed the system required by the Interstate Commerce Commission is an air brake.[33] Air brake equipment includes a compressor on a locomotive, air brakes on the wheels and hose connections between the cars. Whether vehicles the size of a motor car or push truck can as a practical matter be equipped with these devices is a matter of doubt. None has ever been so equipped. An air brake system could prevent the motor car and push truck from performing their normal function since it is imperative that a crew of three or four men be able to lift these vehicles from the track at the place of work (R. 42), or in an emergency en route, to permit the passage of regular trains. Furthermore, it has

[32] See Hertel, *op. cit. supra*, note 22, at pp. xvi and 14.

[33] Commission's Order No. 13528, 49 C.F.R. § 132.3.

never been determined on the basis of evidence or actual test that more abrupt stops are desirable with respect to this equipment. The Court of Appeals in this case merely assumed that this was so, although the evidence in the record (R. 65) was that too sudden a stop could throw the section gang from the car.

If the motor car and push truck are covered by Section 1, they must of necessity also be covered by Section 2, where the language "any car" is even broader.[34] If covered by Section 2, they must be equipped with "couplers coupling automatically by impact." This section, as its own terms make clear, was designed to obviate the necessity of "men going between the ends of the cars." However dangerous such a procedure may be in a case of box cars, gondolas, hopper cars and other standard train cars, the danger of injury from going between a motor car and push truck which will be pushed together for coupling *by hand* could hardly be a danger which Congress sought to eliminate. No safety reason exists for compelling maintenance of way vehicles to meet this requirement, and if they meet it with couplers of the type now in use weighing 200 pounds apiece (R. 90), it is not likely that a section crew will be able to lift the motor car and the push truck from the tracks.

An interpretation which places these vehicles under Section 1 must inevitably place them not only under Section 2, but under Sections 4, 5, 8 and 11 as well. Accordingly, the motor car and push truck would be required by statute to be equipped with useless grab irons or hand holds, with drawbars at a height of 31½ to 34½ inches [35] placing them several inches above the floor of the push truck, with secure sill steps to climb to nowhere, and with efficient hand brakes.

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[34] The words "any car" in § 2 have been construed broadly to include locomotives as well as other regular railroad cars. See *Johnson* v. *Southern Pac. Co.*, 196 U.S. 1 (1904).

[35] Commission's Order of Oct. 10, 1910, 49 C.F.R. § 132.2.

None of these devices performs a useful function. The hand brake would be of use only if a passenger were to ride the push truck, a less safe and less comfortable position than his regular place on the motor car.

Imposition of these requirements with respect to maintenance of way equipment would bring about a result quite different from any which the Safety Appliance Act has accomplished in other fields:

> "In reviewing these matters it should be pointed out that neither the law nor the orders of the Commission have required the use of anything that is new. All of the appliances which are required were developed in railroad service and were more or less in general use before there was any requirement of law that that must be used. The principal objective of the law was to require all railroads to adopt and use appliances which had been demonstrated to be essential to safety of railroad employment, and to provide that degree of uniformity and standardization necessary when cars are freely interchanged throughout all section of the country."[36]

(4) The Commission Has Consistently Interpreted the Act as Not Covering These Vehicles

The Interstate Commerce Commission has administered the Safety Appliance Act since the Act's inception. The Bureau of Safety & Service performs this function. Throughout the sixty-three years of its administration of the Act, the Commission has never ruled that motor track cars and

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[36] Mills, "*Requirements of Federal Safety Appliances Law*," 21 I.C.C. Practitioners Journal 398-404 (1954). Mr. Mills was Director of the Commission's Bureau of Safety at the time this article was written. In this regard it is significant that, with rare exceptions, Safety Appliance Act cases have turned on the issue of whether *existing* appliances were *defective*. In no other known case has the Act been held to require these appliances on a class of standard vehicles never previously equipped with them.

push trucks were subject to the Act and the Bureau has taken no cognizance of these vehicles (R. 84-92).

Pursuant to Section 12 of the Act, the Commission on March 11, 1913, published its Safety Appliance Standards Order specifying the number, dimensions and location of safety appliances required by the Act. This order, republished in 1946 (49 CFR, §§ 131-136), is presently in effect. It nowhere mentions motor track cars or push trucks, and the Commission has never prescribed standards for these vehicles (R. 87).

(5) State Legislatures Regulate Motor Track Cars on the Assumption That They Are Not Locomotives

This Court has held that Congress has completely preempted the field of regulation with respect to locomotives so that state legislation is precluded. *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926). And the Court was speaking of "locomotives" as the term is used in the Safety Appliance Act:

> "Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously it did not do so by the Safety Appliance Act, since its requirements are specific. It did not do so by the original Boiler Inspection Act, since its provisions were limited to the boiler. . . . But the power delegated to the Commission by the Boiler Inspection Act as amended is a general one. . . ." 272 U.S. at 611.

In the Court's own words, "state legislation is precluded because the Boiler Inspection Act, as we construe it, was intended to occupy the field." 272 U.S. at 613.

Yet, with respect to motor track cars, laws enacted by the legislatures of no less than twenty-six states are in effect today. **References to these laws appear in Appendix B to this brief.**

(8) No Decided Cases Support the Ruling of the Lower Court

The decision of the Court of Appeals thus comes as a surprise to the men engaged in the industry, to the Commission which regulates it, and to the legislatures of twenty-six states which have consistently assumed that their own jurisdiction in the field is clear. The assumption was a reasonable one because, this proceeding aside, *no court has ever held that Section 1 of the Safety Appliance Act applies to maintenance of way vehicles.*

The cases relied upon by respondent in argument below and by the Court of Appeals and District Court in deciding this case, do not so hold. The two decisions which apply Section 1 to motive power other than standard railroad locomotives can be readily distinguished. Thus, *Hoffman* v. *New York, N. H. & H. R. Co.*, 74 F. 2d 227 (2d Cir. 1934), held that Section 1 applied to a "gasoline tractor," "locomotive," or "engine" concerning which the court said, "[it] was frequently used to haul a long line of cars, and there was as much reason for its being equipped to control their movements, as though it had been a steam locomotive employed for a similar purpose." 74 F. 2d at 232. The cars to which the court referred were standard railway cars. The gasoline locomotive was equipped with a standard automatic coupler because of the use to which it was normally put.

The case of *U. S.* v. *Fort Worth & Denver City Ry. Co.*, 21 F. Supp. 916 (D. Tex. 1937), involved a "Browning steam locomotive crane" which was engaged in hauling a tender and standard railroad flat cars to and from the place where the crane was employed unloading heavy boulders carried on the cars. It is interesting to note that this case was brought by the Federal Government as a prosecution under the Safety Appliance Act and the Interstate Commerce Commission took the position that Section 1 applied to the locomotive crane when it was being used as a locomotive.

The gasoline tractor in the *Hoffman* case and the locomotive crane in the *Fort Worth & Denver City* case both were regularly used to haul standard railroad cars over the tracks in movements which were, in the commonly accepted meaning of the term, train movements. So employed they present a totally different problem than does a small maintenance of way motor car, used to haul workmen to and from a place of work and on occasion to pull a small push truck under conditions which require that both vehicles must be lifted from the track by three or four men.

D. SECTION 11 DOES NOT APPLY TO THE PUSH TRUCK

The Court instructed the jury that the push truck was required to have a hand brake (R. 74). It is true that Section 11 makes it unlawful for any common carrier subject to the Act to haul "any car subject to the provisions of sections 11 to 16 of the Act" unless that car is equipped with "efficient hand brakes." Presumably, the words "any car" standing alone could include the push truck involved in this case. It is immediately apparent, however, that the statute was not intended to include every conceivable car owned or operated by a railroad and to require that all these cars be equipped with the safety devices. Accordingly, some reference to the legislative history is helpful to determine the Congressional intent.

Section 11 was added to the Safety Appliance Act in 1910.[37] The original Act in 1893 had established the basic requirements. The amendment in 1903 had broadened the coverage of the Act with respect to vehicles and train movements. The problem which the 1910 legislation sought to meet was a need for standardization in the safety appliances used; the lack of uniformity was itself causing injuries. President Taft had said in his annual message in the preceding year, "In addition to the foregoing amend-

[37] 36 Stat. 298 (1910), 45 U.S.C. § 11 (1952).

ments to the interstate commerce law, the Interstate Commerce Commission should be given the power, after a hearing, to determine upon the uniform construction of those appliances—such as sill steps, ladders, roof hand holds, running boards, and hand brakes on freight cars engaged in interstate commerce used by the train men in the operation of trains, the defects and the lack of uniformity in which are apt to produce accidents and injuries to railway train men."[38]

The House Committee report had stated the same problem:

> "At the present time and for many years in the past various railroads have had different methods of equipping their cars, and frequently the same railroad does not equip all of its own cars in the same manner, so that practically every freight train on every railroad has several methods and places for the various devices and appliances necessary for the use of railroad employees."[39]

The Commission in its annual report of 1909 had said:

> "The strongest argument for the extension of this law here recommended is found in the necessity to secure uniform equipment. It is of vital importance to employees that appliances designed for their safety shall be placed alike on all cars of the same class so that they will know with certainty night or day that they will always find them in like occasions."[40]

Uniformity was imperative because *trainmen* working *trains* by day and by night would operate under much safer conditions if the appliances they needed—sill steps, ladders,

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[38] Quoted in S. Rep. No. 250, on H.R. 5702, 61st Cong. 2d Sess. 2 (1910).

[39] H.R. Rep. No. 57, on H.R. 5702, 61st Cong. 2d Sess. 1 (1909).

[40] Annual Report, 1909, 41.

running boards, grab irons and the like—were uniform in character and were located in the same place on all cars regardless of the railroad from which they came. The purpose of the new law and the language used to describe it again emphasized the point that Congress was dealing with the problems of "freight cars" and "train men" operating "trains" as President Taft said. They were concerned with "freight trains" in the Committee's words. Congress indicated no intention of imposing any of these requirements of the statute on maintenance of way vehicles.

The point is underlined by what the legislative history discloses as the reason why the amended Act required an efficient hand brake. The Senate report points out that with the widespread use of air brakes, railroads were permitting hand brakes to become inoperative or defective.[41] As a result trainmen "humping" cars in yards (switching cars by gravity in yards where a mound or hump is provided) were being injured when cars got away as a result of defective hand brakes. Again, this problem has nothing whatsoever to do with push trucks which are easily pushed by hand by the section gang.

Under Section 12, the Commission was given the authority to determine the number, dimensions, location and manner of application of the appliances provided for in Section 11. Needless to say the Commission has never issued an order which requires hand brakes on maintenance of way push trucks. The ruling of the Court of Appeals gives Section 11 an effect which its sponsor and administrator, the Commission, never sought and never approved and which Congress never intended.

Aside from the lower courts in this case, but one other court has held that Section 11 applied to maintenance of way vehicles. In *Martin* v. *Johnson*, 79 So. 2d 419 (Fla. 1955), the Florida court held that a violation of Section

[41] S. Rep. No. 250, *supra*, note 38, at 2.

11 was involved if a motor track car did not have efficient hand brakes. The court, however, apparently did not have the legislative history of the Safety Appliance Act before it and assumed that it could apply the various sections on a piecemeal basis, relying on its own view of the exigencies of the situation. After agreeing that there was a serious question as to whether a track motor car would be a "car" within Section 2 (so that automatic couplers would be required) when it was operated alone, the court said:

> "There being as much reason for requiring the motor car in question to be equipped with efficient hand brakes to insure its safe operation when propelled under its own power, as there is for the requirement that such a car be equipped with automatic couplers, where it is to be used in connection with a train movement, we have the view that the Safety Appliance Acts are applicable and that we are not authorized to depart from the literal terms of the Statute." 79 So. 2d at 420.

To the Florida court, the Safety Appliance Act represents a grab bag from which the court can select and apply a requirement under the pretense of interpreting the word "car" in this statute whenever the court, without the benefit of an investigation, deems the requirement to be desirable.

II.

If the Act Does Apply, These Maintenance Vehicles Are Expressly Exempted by Section 6

The following proviso appears on Section 6 of the Safety Appliance Act as passed in 1893:[42]

> "*Provided,* That nothing in this Act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains."

The proviso was apparently an amendment made from the floor in the course of the debates on the Act of 1893. Rele-

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[42] 27 Stat. 532 (1893).

vant statements made on the floor of the Senate are quoted in the printed record in this case (R. 6-7).

Senator Blodgett offered the amendment explaining that coal was transported from mine to seaboard in four-wheel cars because only these cars, as distinguished from eight-wheel cars, could negotiate the turns and grades from the junction points on the regular railroad lines up to the coal mines. As a practical matter, cars "such as are used in that traffic," i. e. four-wheel cars, could not be equipped with the appliances and devices required in the original Safety Appliance Act, in particular with a train brake system and with automatic couplers.

The amendment could have been limited expressly to coal cars by the addition of one word, but was not. There was no reason why it should be so limited. The fact that a car carried coal had little to do with the question whether it could be equipped with power brakes and automatic couplers. The fact that it had four wheels was clearly relevant to that question because the number of wheels was an indication of the size, strength, and construction of the car.

In 1896, the proviso was itself amended for the purpose of enlarging the exemption to include certain types of logging cars. Senator Walcott explaining the bill to the Senate immediately before its passage stated:

> "the effect . . . is merely to provide that trains used exclusively for logging may be relieved from the provisions of the act. The cars used in logging trains, of which there are about 400 in the United States, are only 24 inches high, and it is physically impossible to equip them with grab irons and the other appurtenances required by law."[43]

As amended the proviso reads:

> "*Provided*, That nothing in this Act contained shall apply to trains composed of four-wheel cars or to

[43] 28 Cong. Rec. 3129, 54th Cong. 1st Sess. (1896).

trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.''[44]

Nothing in the legislative history of the 1896 amendment indicates any intention to restrict the scope of the previous exemption, and nothing in the 1896 discussions lends support to the proposition that the previous amendment was intended to apply *only* to coal cars.

It is, of course, petitioner's position that the Safety Appliance Act does not apply at all to the small motor cars and push trucks which railroads use for maintenance of way purposes, that the word ''locomotive'' when it appears throughout this Act means locomotive in the usual sense—railroad engines which pull trains—and that the word ''car'' when it appears in this Act means a railroad car normally hauled on the railroad as part of a train.

If, however, the word ''locomotive'' and the word ''car'' when they appear in the other sections of the Act are broad enough to include motor track cars and push trucks, then those same words when they appear in the proviso of Section 6, are broad enough to include motor track cars and push trucks. If the motor car and push truck attached constitute a ''train'' composed of ''cars'' under Section 1, then the train is most certainly a ''train composed of four-wheel cars'' under Section 6 and accordingly is exempted.

In the *Hoffman* case,[45] the court merely stated that ''the

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[44] 29 Stat. 85 (1896). When § 6 was codified the words ''nothing in Sections 1-7 of this title'' were substituted for ''nothing in this Act contained.'' With the exception of this technical correction, the 1896 exemption provision exists verbatim in the present Code. 45 U.S.C. § 6 (1952).

[45] *Hoffman* v. *New York, N.H. & H.R. Co.*, 74 F. 2d 227 (2d Cir. 1934), cert. denied 294 U.S. 715. See text *supra* at p. 22.

exemptions in Section 6 are expressly limited to 'logging' trains." The Court of Appeals in the present case correctly rejected this holding after a review of the legislative history of the proviso as originally enacted in 1893 and as amended in 1896. The Court of Appeals, however, went further and held that the first part of the exemption, the reference to trains composed of four-wheel cars, exempts coal cars alone. This holding imposes a limitation on Section 6 which Congress itself did not see fit to impose either when the provision was first enacted or when it was amended. It disregards the plain language of Section 6 to reach the result now before this Court.

The Court of Appeals gave two arguments in support of its conclusion. The first consisted of the Court's own illustration—without support in this record or common experience—that if the Act did not apply, a railroad might run "entire trains of four-wheel maintenance and supply cars drawn by a powered tractor."[46]

The first comment to be made with respect to this argument is that the Safety Appliance Act was intended to apply to railroad vehicles as they were used on the railroads. It surely was not designed to impose onerous requirements on equipment presently used in a safe manner on the mere assumption that the equipment might some day be used in an unsafe manner, particularly where the assumption is based on nothing more than conjecture. Second, a train of four-wheel coal cars, admittedly exempt, would present safety hazards as great as, if not greater than, a train of four-wheel maintenance cars. Third, the practical difficulty of equipping a car with the required safety devices would certainly be greater with maintenance vehicles than with coal cars. The additional weight which would render maintenance vehicles useless would not even be noticed on a coal train.

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[46] 233 F. 2d at 663.

The Court of Appeals had a second reason for excluding maintenance vehicles from the plain language of the exemption. Unless covered,

> "a four-wheel motor track car like the one appellee was driving need not even be equipped with hand brakes as required by § 11 of the act, even though that car might be driven along a slippery railroad track at 20 m.p.h."[47]

As has been pointed out previously, the railroad industry and the Commission have taken for granted for the last half century that this equipment was not subject to the Safety Appliance Act, yet the motor car in this case was equipped with a hand brake sufficiently effective to lock the wheels when applied by the section foreman (R. 55). If, over the years, there had been a problem of inadequate braking power on these cars, there can be no doubt that the state legislatures which had required windscreens, headlights and other appliances for motor cars[48] would have required brakes. It is sufficient to say that for the past sixty years builders have manufactured and employees have driven motor track cars equipped with efficient hand brakes. A strained construction of this exemption is not justified by a desire to protect employees against a hazard which does not exist.

III.

This Court Should Adopt the Commission's Interpretation of the Statute

It is a well-settled principle of law that "[n]othing is more convincing in interpretation of a doubtful or ambiguous statute" than a uniform practice of the responsible

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[47] Id. at 664.

[48] A list of the statutes of twenty-six states which regulate the equipment required on motor track cars is provided as Appendix B to this brief. See text *supra* at p. 21.

administrative agency. *Wisconsin* v. *Illinois*, 278 U.S. 367, 413 (1929). See *Logan* v. *Davis*, 223 U.S. 613, 627 (1914).

This is particularly true when the interpretation is a long-standing one and well known to Congress which has had a long continued opportunity to correct it if it is wrong. *Norwegian Nitrogen Products* v. *United States*, 288 U.S. 294, 313 (1933). *United States* v. *Jackson*, 280 U.S. 183, 196-7 (1930). Failure of Congress to alter a statute after a consistent administrative interpretation of long standing creates a presumption in favor of the administrative interpretation to which this Court should give great weight. *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345 (1932).

The rule in question has been applied by this Court to interpretations which the Interstate Commerce Commission has given to the Safety Appliance Act. In *Davis* v. *Manry*, 266 U.S. 401 (1924), the Court ruled that the word "roof" in Section 11 (45 U.S.C. § 11, § 2 of the Safety Appliance Act of April 14, 1910) meant "roof" in the usual sense so that a grab iron was not required on the flange at the rear of a locomotive tender. The Commission had not required a grab iron in this location on a tender. The Court said:

> "The omission to require a grab iron is a practical construction by the Commission—the tribunal to which the application of § 2 [Section 11] was intrusted, and which would be solicitous to enforce it—that it applies to cars with roofs, and not to tenders, they having no roofs. While the view of the Commission is not conclusive with us, it is properly persuasive. We agree with it." 266 U.S. at 404-405.

The case of *Shields* v. *Atlantic Coast Line*, 350 U. S. 318 (1956), is not inconsistent with *Davis* v. *Manry* on the proposition that this Court should be persuaded by a practical construction of the statute made by the Commission. In the *Shields* case, this Court said:

> "Omission of dome running boards of itself shows no more than that the Commission has not standardized

all possible running boards within § 2. *Davis* v. *Manry*, 266 U.S. 401, is consistent with our view. * * * Moreover, the Commission in that case, having standardized the ladder, had no alternative but to interpret the statutory word 'roofs' by either standardizing the grab iron or not standardizing it. Here no such practical construction is implied by the failure to standardize." 350 U.S. at 322.

In the *Shields* case the Court did not follow an interpretation of the statute by the Commission because in its view no such interpretation had been made.[49] A similar argument cannot be made in the case at bar. The problem here is not one of standardization, a discretionary function of the Commission. The problem is one of enforcement of the Act, a duty imposed upon the Commission by Sections 6, 14 and 15 of the Act. Since it has been obvious to every Commission safety inspector since 1893 that the widely used maintenance vehicles were not equipped with train brakes, couplers, grab irons and sill steps, the failure of the Commission to prosecute the railroads can only be explained on the ground that the Commission holds the view that these appliances are not required. The Commission is before this Court urging that position.

There are unusually persuasive reasons why this Court should adopt this interpretation of the Safety Appliance Act by the Interstate Commerce Commission. In the first place, the Commission played an important role in writing this legislation. The Commission had presented the problem to Congress in its Annual Report of 1889 and had recommended legislation in 1890, 1891 and 1892.[50] The

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[49] The *Shields* case can be readily distinguished from the present case. There the court felt that the force of the Safety Appliance Act should be employed, in addition to the common law requirement of due care, to make sure that dome steps in common use on tank cars be kept in good condition. In this case, the Court of Appeals has required the use of appliances on a whole class of railroad vehicles which have never previously been so equipped.

[50] See note 24 *supra*.

House Committee Report (June 27, 1892) which reported out the bill which became the Safety Appliance Act of 1893 pays tribute to the efforts of Edward A. Moseley, "the efficient Secretary of the Interstate Commerce Commission . . . whose experience gained from years of devotion to this reform and the data in his possession were invaluable aids to its investigation."[51]

Mr. Moseley had urged amendment of the legislation in 1903 after *Johnson* v. *Southern Pac. Co.* was decided in the Circuit Court of Appeals,[52] and the Senate Committee Report contains a long excerpt from the Commission's Annual Report of the previous year.[53] As to the third major change in the Act, the Senate Committee Report reporting out the bill which later became the Safety Appliance Act of 1910 pointed out that the Commission had for several years recommended an extension of the law so as to cover all appliances included in the Master Car Builder's standards for the protection of trainmen.[54]

It is therefore no exaggeration to say that the Commission has played an important role in fashioning the legislation which it has interpreted. It sponsored and recommended the original Act and each major revision of it in order to meet safety problems which it had studied and analyzed and which it had reported to Congress. In this context the Commission's view as to the type of vehicle which Congress intended the Act to cover is entitled to great weight. It has been held that the views of governmental agencies cooperating in developing a statute are especially persuasive in construing it. *Adams* v. *United States*, 319 U.S. 312, 315 (1943). *United States* v. *American Trucking Associations*, 310 U.S. 534 (1940).

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[51] H.R. Rep. No. 1678, *supra*, note 25, at 8.

[52] 117 F. 462 (8th Cir. 1902).

[53] S. Rep. No. 1930, *supra*, note 29, at 81-100.

[54] S. Rep. No. 250, *supra*, note 38, at 2.

It is significant also that the Safety Appliance Act manifests a remarkable degree of reliance by Congress on the Commission for *substantive* decisions with respect to the Act. Thus the very decision of when the Acts were to become effective in the first place was delegated to the Commission.[55] The Commission has extensive power under the Acts to prescribe standards. The height of draw bars under Section 5 was to be certified to the Commission by the American Railway Association within a specified time or prescribed by the Commission if this was not done.[56] Section 12 authorized the Commission to designate the number, dimensions, location and manner of application of the appliances which Section 11 required.[57] Section 9 authorized the Commission to increase the minimum number of cars which had to be equipped with train brakes from the 50% required in the legislation and the Commission did so.[58] Section 6 charged the Commission with the duty of lodging with the proper district attorneys information of such violations of the Act as might come to its knowledge.[59] Congress has relied heavily on the Commission's ability to interpret the Act properly and has never felt called upon to amend the Act in order to change an interpretation given it by the Commission.

Discovery of a congressional intent by a court, an intent previously unknown to the Commission, indeed anomalous. The Commission's Bureau of Safety and Service, through its staff of inspectors, down through the years has kept a watchful eye over the safety problems in the industry. If there had been any intention of Congress to include maintenance of way vehicles under the Safety Appliance Act, that intention would in all prob-

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[55] Section 7 of the original Act so provided, 27 Stat. 532 (1893). This section was eliminated as moot when the Act was codified.

[56] 27 Stat. 531 (1893).

[57] 36 Stat. 298 (1910), 45 U.S.C. § 12 (1952).

[58] 32 Stat. 943 (1903), 45 U.S.C. § (1952).

[59] 27 Stat. 532 (1903), as amended 45 U.S.C. § 6 (1952).

ability have originated in the discovery of a need for regulation by the Commission's staff.

The question posed in this case is simply whether the Safety Appliance Act is to be applied to maintenance of way vehicles. The words which the statutes use, words like "locomotive," "train," "engineer," "sufficient number of cars," etc., do not require this result; to reach it they must be stretched so far beyond their normal meaning that they no longer constitute guides for decision. The legislative history contains nothing which requires this result or even supports it. The sole and only possible basis for reaching such a conclusion must be a belief that safety considerations require it. This is the ultimate decision which the Court of Appeals made in this case. This is clearly the decision which the Florida Court made in *Martin* v. *Johnson, supra.*

It is submitted that the issue whether safety considerations require this change cannot be adequately analyzed and properly decided in this type of proceeding. The question can be better studied and can be decided with far more assurance in a proceeding before the Commission or before a congressional committee where an analysis can be conducted with the benefit of accident statistics over the years, testimony of representatives of the Brotherhoods as to safety needs, and of the railroad officials as to the practical problems presented, and recommendations of experts on the Commission's staff.

The type of inquiry which is called for here is plainly impossible in a personal injury case tried by private litigants before a jury. Much of the evidence on which the Commission or Congress might well rely would not even be admissible in such a proceeding. Practical considerations would prevent it from being offered. Yet an affirmance of the lower court's decision will place these vehicles under the law for the first time just as completely and just as effectively as would an amendment of the Safety Appliance Act by Congress, made after full investigation.

CONCLUSION

An extension of the Safety Appliance Act to cover maintenance of way vehicles would be the first major change in safety legislation on the railroads not advocated by the Interstate Commerce Commission. It would certainly be the first increase in the scope of this legislation made over the Commission's opposition.

Nothing in the language of the legislation requires this result. It can only be reached by doing violence to the plain meaning of the words which Congress used. No purpose which Congress sought to serve would be accomplished by the proposed extension of the Act. Instead, a series of serious practical problems would be created without a showing of need and without the benefit of any factual inquiry whatsoever.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals must be reversed and the cause remanded to the District Court for a new trial.

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